Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

No. 92-204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANKERS TRUST NEW YORK CORPORATION AND CONSOLIDATED SUBSIDIARIES,

Petitioners,

—v—

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DAVID SACHS
Counsel of Record for Petitioners
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-204

BANKERS TRUST NEW YORK CORPORATION
AND CONSOLIDATED SUBSIDIARIES,

Petitioners.

—v.—

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND
COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

THE DECISION BELOW DOES NOT COMPORT WITH PRIOR PRONOUNCEMENTS OF THIS COURT

The sole argument advanced by respondents to support their opposition to the grant of the Petition is that the state court's determination that the City financial corporation tax is a franchise tax was proper "since it fully comports with prior pronouncements of this Court concerning what constitutes a

Note: The list of companies required by Rule 29.1 is included in the footnote on page ii of the Petition and is currently accurate.

franchise tax." This argument, however, incorrectly characterizes the prior pronouncements of this Court.

Not one of the Supreme Court (or other) cases cited by respondents deals with the treatment of a municipal tax as a franchise tax. Rather, respondents seek support from general definitions of *state* "franchise taxes" as taxes imposed on a privilege. And since the City tax ordinance, begins with the language "for the privilege of doing business in the city in a corporate or organized capacity . . . ,"[1] respondents contend that the City tax falls within the definition. In effect, respondents (and the court below) are asserting that it makes no difference whether the tax is a state tax or a city tax, as long as it contains the privilege language. This assertion is doubly flawed.

First, even during the heyday of the special distinction accorded by this Court to franchise taxes, the Court never grounded this distinction merely on the inclusion in a taxing statute of language referring to "privilege." Rather, the Court's concept was that a franchise tax was a charge for a valuable benefit relating to the corporate status conferred in the discretion of the state.[2] Since a city has no power or authority to confer such a benefit, its tax cannot fall within this rationale, regardless of the prefatory privilege language. In this connection, it is emphasized that petitioners are not differentiating between the grant of a franchise "to be" a corporation and the grant of authority "to do" business (in exercise of the franchise).[3] The city has power over neither the grant nor the con-

---

1 There is a dispute between petitioners and respondents over the City's authority under state law to include the last six words, "in a corporate or organized capacity." *Compare* Pet., p. 11, n.6 *with* Br. in Opp., pp. 4 and 6, n.1. Further discussion of this point is reserved for petitioners' brief should the Court grant certiorari.

2 *E.g.*, see *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 109, 111-112 (1975); *Werner Machine Co.* v. *Director of Taxation*, 350 U.S. 492, 493 (1956). Moreover, these and all the other cases cited by respondents involved state taxes.

3 It has been suggested, however, in at least one Supreme Court opinion that for purposes of exception from § 3701, there is a difference. See

tinued exercise of the corporate franchise. This is not to say that the City has no authority to tax corporations, but only that such tax is not a franchise tax.

Second, and perhaps more significant in the context of Rev. Stat. § 3701, an expansive definition of franchise tax as including any purported privilege tax (without regard to the taxing authority's right to grant the privilege) is inconsistent with the language and purpose of the 1959 amendment to Rev. Stat. § 3701. As this Court stated in reference to Rev. Stat. § 3701, as amended in 1959, "The language of § 3701 encompasses 'every form of taxation,' and is inconsistent with implied exceptions." *American Bank & Trust Co.* v. *Dallas Co.*, 463 U.S. 855, 864, reh'g den., 463 U.S. 1250 (1983). The Court there rejected a plea for continuation of the old case-law exception for a bank shares tax which, before 1959, had been treated the same as a franchise tax under § 3701. Likewise, the expansion of the definition of "franchise tax" to include city as well as state taxes is unwarranted. Under the amended language of Rev. Stat. § 3701, the only way a corporate tax other than a franchise tax can qualify for exception is if it is "in lieu of" or "instead of" a franchise tax. An expansive definition of "franchise tax" would emasculate the in-lieu requirement, at least in a case such as the present one where the City tax is clearly in addition to, and not in lieu of, a state franchise tax. In addition, § 3701 excepts franchise taxes "imposed on corporations," indicating that the exception was for the traditional state corporate franchise tax, and not for other "privilege" taxes which could just as easily be imposed on noncorporate businesses[4] as well as corporations.

Home Ins. Co. v. *New York*, 134 U.S. 594, 599 (1890) ("By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise.")

4 The state enabling act in the present case authorized "the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses . . . ." See Br. in Opp., p. 2.

This Court, in the *American Bank* case, summarized the purpose of the 1959 amendment to § 3701 as follows:

> "Congress intended to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment." 463 U.S. at 867.

It would hardly effectuate this purpose now to expand the formalistic exception for state franchise taxes to include other "privilege" taxes which had never been held to be excepted under the pre-1959 law.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari and review the decision of the New York Court of Appeals.

Respectfully submitted,

DAVID SACHS
Counsel of Record for Petitioners
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8357

September 9, 1992